

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

439

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23183

UNITED STATES OF AMERICA,

Appellee,

v.

OLLIE E. HOPKINS,

Appellant.

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 24 1970

Nathan J. Paulson
CLERK

Samuel L. Davidson,
360 National Press Building,
Washington, D. C. - 20004
(Telephone: 638/0603)

Attorney for Appellant
(Appointed by this Court.)

QUESTIONS PRESENTED

In the opinion of Appellant, the following questions are presented:

1. In a trial upon an indictment for manslaughter, should the Court have granted the accused's motion for judgment of acquittal where the Government failed to prove extreme recklessness of the accused in the handling of a pistol?

2. Should the Court have granted the accused's motion to suppress testimony relating to appellant's incriminating statements made to the police officers making the arrest at the residence of the accused where such testimony was highly prejudicial to the accused?

3. Should the Court have entered judgment of acquittal after all the testimony had been adduced at trial, where such testimony, even if taken most favorably for the Government, did not show that the accused was extremely reckless in handling a pistol at his residence?

4. Did the Court err in instructing the jury that the Government was not required to prove the guilt of defendant beyond a reasonable doubt?

This case has not been before this Court previously under the same or similar title.

INDEX

	<u>Page</u>
Questions Presented	i
Index	ii
Table of Authorities (Cases relied upon by appellant are marked with an asterisk).	iii
Judisdictional Statement	1
References to Rulings	1a
Statement of the Case	2
Statement of Points	10
Summary of Argument	12
Argument	14
Conclusion	26

TABLE OF AUTHORITIES

<u>CASES</u>	Page
*Miranda v. Arizona, 384 U.S. 436	18, 20
Connecticut v. Holton, 247 A.2d 229	19
State v. Aiken, 434 P.2d 10	19
*U.S. v. Pardee, 368 F.2d 368	22, 23
State of Maryland v. Chapman, 101 F.Supp. 335	22
 <u>Statutes and Rules</u>	
22 D.C. Code 2405	14
18 U.S.C. 1112	15
Rule 52(6) F.R.Cr.P.	17
 <u>Treatises</u>	
Model Penal Code (Proposed Official Draft) Section 211.2 (p. 135)	16
Wigmore, Evidence 2497 (3d. ed. 1940)	25

* Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	NO. 23183
)	
OLLIE E. HOPKINS,)	
)	
Appellant.)	

BRIEF FOR APPELLANT
JURISDICTIONAL STATEMENT

On October 17, 1968, appellant was indicted on one count of manslaughter in violation of D. C. Code 22-2405. He was tried in the United States District Court for the District of Columbia, before Judge Aubrey E. Robinson, Jr., and a jury. Appellant was convicted and was given a suspended sentence of two (2) years to ten (10) years, subject to probation for a period of five (5) years, and on further condition that he will neither own nor possess a firearm. Subsequent to this conviction, Judge Aubrey E. Robinson, Jr., entered an Order authorizing appellant to prosecute an appeal without prepayment of costs.

This Court has jurisdiction upon appeal to review the judgment of the District Court under 28 U.S.C. 1291.

REFERENCES TO RULINGS

Ruling admitting defendant's
incriminating statements to the police
officers on the scene of the fatal
shooting after defendant had been
placed under arrest.

TR 142, 143

Denial of Motion for Judgment
of Acquittal at close of Government's
evidence.

TR 194

Denial of that portion of
defendant's address to jury relating
defendant's state of mind to the
standard of reasonable doubt.

TR 325

STATEMENT OF THE CASE

In the early morning hours of September 28, 1968, Shelia Cradle, a twenty (20) year old female, was fatally shot in the apartment of appellant, Ollie E. Hopkins, a twenty-three (23) year old male. The apartment is located at 2114 Suitland Terrace, Southeast, Washington, D. C.

Prior to the accident resulting in the death of Shelia Cradle, appellant had been actively working in the poverty program as a community worker under the direction of Rev. Robert D. Smith. Appellant's duties as a community worker were connected with housing (Tr. 10, 23).

The cause of the shot was accidental, as testified to by appellant himself (Tr. 55), and as related by appellant to the investigating police officer Spriggs immediately following the accident (Tr. 28, 29, 164).

The deceased was to marry appellant's brother Neil (Tr. 210). On the night of the fatal shooting, appellant, the deceased, and a man named Ben Blackwell had gone to Gino's Restaurant (Tr. 164). They had gone to the restaurant for the purpose of talking out a personal conflict that had arisen between Ben Blackwell and the deceased. Prior to that, Ben Blackwell had threatened appellant with the pistol. This pistol, a 25-caliber automatic (Tr. 163), from which the fatal shots originated belonged to Ben Blackwell from whom

Appellant had taken it (Tr. 165) for the purpose of safe-keeping it and preventing Ben Blackwell from getting into trouble, the latter having displayed the pistol in the restaurant (Tr. 272, 287).

After Appellant, the decedent and Ben Blackwell returned to Appellant's apartment from Gino's Restaurant, Appellant handed the pistol to his wife, Gaynelle Hopkins, who hid the pistol in the baby's diaper hamper (Tr. 200, 214). Thereafter, Appellant asked Ben Blackwell to leave his apartment. The persons remaining at the apartment were Appellant, his wife and baby, and the deceased. They all sat down on a couch, with Appellant sitting between his wife, who was holding the baby, and the deceased. They were sitting closely together, touching elbows (Tr. 217, 227). The deceased was sitting to Appellant's left side, and his wife to his right side (Tr. 201). Both Appellant and deceased were sitting in a slouched position (Tr. 201).

At this point in time, Appellant asked his wife to hand the pistol to him which his wife had placed on a spiral notebook on the floor (Tr. 218). The record does not indicate how the pistol got from the diaper hamper onto the notebook. Presumably, Appellant's wife took it from the hamper and put it on the notebook after Appellant asked her where the pistol was (Tr. 218, 273).

After Appellant's wife handed him a pistol, he emptied it, telling the deceased that it was now empty and that it was on safety (Tr. 166, 200, 203, 204, 225). Appellant himself testified that he specifically recalled having checked again that the pistol was not loaded, and that he put on the safety in backward position (Tr. 276).

At that point in time, Appellant also asked the deceased to hand him the clip (Tr. 280, 281). He put it into the gun as testified to by Appellant as follows (Tr. 281):

Q. "But then sometime later you obtained it from Sheila -- the clip?

A. Yes.

Q. And you put the clip into the gun?

A. Yes, I did.

Q. What did you do at that point in time?

Describe exactly for the ladies and gentlemen of the jury what you did at that time?

A. I looked at the gun. I pulled the chamber back and the bullet popped out. So, I just ejected the bullet out of it.

Q. Did you pull the clip out, too?

A. I looked into the little outlet that the bullet -- that the bullets eject from, you know, to check whether or not it had

a bullet. I dropped the clip. I put the safety on. I pointed it at the wall."

Appellant then pointed the pistol with his left hand at the wall in front of him (Tr. 203, 224, 228) and pulled the trigger (Tr. 227, 273). The pistol merely clicked or rattled (Tr. 166, 176, 205, 228, 282). Appellant made a remark to the deceased "See, nothing happened" (Tr. 176). Appellant testified with respect to this occurrence as follows (Tr. 273):

Q. "Did you say anything at that particular time when you were pointing at the wall?"

A. Well, before I pointed to the wall, my wife had that worried look on her face and I just told her, "It's not loaded". I said, you know, "It's empty."

As Appellant retracted his left hand in which he held the pistol, it went off (Tr. 200), with the bullet entering the deceased's head behind her right ear (Tr. 162). The course of the bullet, after it entered the head of the deceased, was upwardly from right to left (Tr. 243).

In describing the specific moment at which the shot went off, Appellant testified (Tr. 273):

"I had the gun in my left hand. Gay was saying something and I looked towards that direction and the gun went off."

Appellant then asked the deceased "Shelia, did I hurt you?" (Tr. 204) or words of similar import, noticing blood on top of the head of the deceased (Tr. 274).

Appellant was extremely distraught after the shooting, sitting alternately on the floor and falling down on the couch, while crying all this time (Tr. 38). He was in such state of confusion that he even sat his baby face down (Tr. 56). His utterly confused mind was further demonstrated by his answers to questions put to him by the police officers who investigated the scene of the accident; his answers were unresponsive, and all he would say was "I shot her", rather than give a direct logical answer to a specific question (Tr. 39).

The police and ambulance were called to the scene by Appellant's wife who had been told to do so by Appellant immediately after he noticed that the deceased had been hurt (Tr. 51, 57).

Appellant was crying after he realized that he had shot the decedent (Tr. 32, 36, 177). He attempted desperately to keep the deceased from dying by giving her mouth-to-mouth resuscitation (Tr. 27, 160, 161), but was stopped in these efforts after the police officers arrived on the scene (Tr. 27, 161).

Police Officer Spriggs who, together with Officer Copeland, had been called to the scene of the accident,

testified that the pistol was loaded when he recovered it (Tr. 164) after Appellant had told him that it was under the couch or thereabouts. According to Officer Spriggs' testimony, one bullet was left in the chamber of the pistol and two in the clip (Tr. 164). There is a conflict in the testimony with respect to the question whether the pistol was loaded. Appellant testified that the clip was not in the pistol (Tr. 276, 286).

Appellant testified that he did not remember having been advised of his Constitutional Rights when the police officers questioned him at his apartment, but even if he had been advised of such rights, he still would have answered all of their questions (Tr. 61).

Officer Spriggs was permitted to testify, over Appellant's objections, that Appellant told him, after having been placed under arrest and being advised of his Constitutional Rights (Tr. 164), that "he pointed the pistol in the general direction of the deceased and pulled the trigger and it went off" (Tr. 166, 176). This testimony given by the officer is also in direct conflict with the testimony of Appellant when testifying on his own behalf, according to which he specifically recalled that he did not pull the trigger (Tr. 274). Appellant did not show Officer Spriggs the manner in which he was holding

the pistol when it went off (Tr. 176).

According to the expert testimony of Colonel Crossman, the pistol was of an unknown make, made in Spain, and representative of many very cheap Spanish made pistols, poorly made from the beginning and in even worse shape thereafter (Tr. 246, 247). Its barrel was badly rusted and the function of the pistol was extremely poor (Tr. 247). The pistol could fire with its magazine removed, and no safety position was indicated on it (Tr. 247). The pistol would be blocked only if the safety device was completely in place, but the latter could gradually work down (Tr. 251), whereupon the pistol could be fired (Tr. 252).

When the pistol's safety device pointed to the rear or front, and if the pistol was then dropped on a solid surface, the safety device would usually jar off to the firing position (Tr. 251).

A portion of the trigger worked against the wrong part of the safety device, and the spring which was to hold the safety device in safety position was not operating under proper service (Tr. 253). This mechanical defect could force the safety device to rotate and thus release it (Tr. 253).

When the expert witness fired the pistol with Remington shells, said shells being of the same make as the bullet which caused the death of the decedent, all gave

malfunctions and the pistol did not function properly (Tr. 254, 259). The cartridge would fire, but it would not be ejected out of the pistol (Tr. 255). Each time the pistol had to be cleared, the empty case had to be taken out by hand (Tr. 255). In order to check whether the pistol was loaded or not, its magazine had to be removed, its slide had to be opened, and then one had to look into the chamber to see if a cartridge might somehow have been left in the chamber by a defective part (Tr. 256). Furthermore, the pistol's extractor spring was either weak or broken, so that it had very little effect on the extractor device (Tr. 265).

At the time of the accident, the room in which Appellant, the decedent and Appellant's wife holding the baby were sitting was dim, except for a light in the hallway and kitchen (Tr. 203, 276).

The atmosphere immediately preceding the accident was quiet, and there were no bad feelings between Appellant and the deceased (Tr. 239, 240). At no time did Appellant point the pistol directly at the deceased (Tr. 204), or aim at any specific point in space other than to the wall in front of him (Tr. 237).

STATEMENT OF POINTS

1. At the termination of the Government's presentation of evidence, the Court erred in denying the accused's motion for acquittal, said motion having been based on the Government's failure to prove that the accused was grossly or recklessly negligent in accidentally discharging a pistol.

2. Where the Government's only witness testifying to the acts of the accused was a police officer who was not an eyewitness to the actual event but merely testified as to incriminating statements made to him by the accused himself, the Government failed to establish its case, and the Court erred in denying the accused's motion of acquittal at that stage of the trial.

3. The evidence adduced by the accused during the hearing regarding the voluntariness of his confession at his residence was compelling to conclude that he was incapable at that time of knowingly, voluntarily and intelligently waiving his constitutional rights, and the Court erred in permitting officer Spriggs to testify at the trial with respect to the accused's incriminating statements.

4. The totality of the evidence adduced at trial warranted the conclusion that the death of Shelia Cradle was the result of an unavoidable accident, and the Court erred in failing to instruct the jury sua sponte, that it may

also consider the possibility of the occurrence of an accident.

5. The Court's charge to the jury that the Government need not prove defendant's guilt beyond a reasonable doubt could only have confused the jury and was substantial prejudicial error.

SUMMARY OF ARGUMENT

A careful reading of all the testimony adduced at trial fails to disclose any facts tending to show that the accused was extremely reckless when he pointed a pistol at a wall in front of him after he had made certain that the pistol was not loaded. Of course, appellant does not dispute that the evidence may have justified finding him negligent or careless to a certain degree, but such negligence or carelessness was at most of a simple degree, a mere matter of "showing off", and it certainly was not of the high degree of extreme recklessness or gross deviation from the standards of behavior of a reasonable man, which is required as an element to establish the offense of voluntary manslaughter.

Furthermore, appellant submits that the Government failed to prove its case since the only testimony pertaining to the question of the degree of negligence necessary to support an indictment for manslaughter was presented by police officer Spriggs who did not have firsthand knowledge of the facts constituting such negligence, but learned of them only from the mouth of the accused after the accident. Not only should less weight have been given to such testimony by virtue of the lack of firsthand knowledge, but it should not even have been admitted at trial for the reason that appellant had not voluntarily, knowingly and intelligently waived his rights to remain silent and to have the

assistance of a lawyer at a time when he had already been placed under arrest.

Even after the close of all the evidence, it was still insufficient to go to the jury since no reasonable man could infer from the testimony that the accused was extremely reckless, or that he had deviated grossly from the conduct of a normally prudent person.

The Court should, therefore, have granted the accused's motion for judgment of acquittal presented at the close of the Government's evidence.

Lastly, it is appellant's position that the Court committed a highly prejudicial error of law when it instructed the jury that the Government was not required to prove defendant's guilt beyond a reasonable doubt. It is also appellant's position that the Court should have instructed the jury that they could find the shooting to be merely accidental. The failure of the Court to charge in terms of accidental shooting made the Court's charge to the effect that "you have to consider more than whether or not there was an accidental shooting," highly prejudicial to appellant.

ARGUMENT

1. The Court should have granted the accused's motion for acquittal at the close of the Government's evidence, since it failed to establish any facts of extreme recklessness or gross deviation from the standard of conduct of a normally prudent person.

At the outset, appellant wishes to invite this Court's attention to the apparent lack of definition of the crime of manslaughter in the District of Columbia. The only reference to manslaughter is found in 22 D.C. Code 2405¹.

Since the indictment was for manslaughter, it could have encompassed two possible situations, namely:

(a) that the accused committed acts which, but for hot blood and sudden passion, would have amounted to murder, or

(b) that the accused was extremely reckless, thereby causing an accidental death.

The situation listed under (b) must have been in the mind of the Government when it sought the manslaughter indictment since there were no indicia in this case other

1 - 22 D.C. Code 2405 provides:

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

than those pointing to accidental death.

Therefore, the sufficiency of the evidence should be judged in view of the elements necessary to make out a case of involuntary manslaughter². These elements are:

- (a) that a human being died as a result of the defendant's act;
- (b) that defendant's act was the result of his extreme recklessness or gross deviation from conduct of a normally prudent person, amounting to reckless disregard for human life.

There is no dispute about the fact that appellant's act of handling the pistol in question was causative of the death of a human being. With respect to the second element, however, a careful scrutiny of the Government's evidence reveals that the question of extreme recklessness was only brought before the jury by officer Spriggs who was permitted to testify as follows (Tr. 166):

Q Did he say that anything happened at all?

A He said all that happened was a click.

Q All right?

A Then he said he pointed the pistol in the

2 - By analogy, the Federal statutory definition of involuntary manslaughter is the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. 18 U.S.C. 1112.

general direction of the deceased and pulled the trigger and it went off.

And again (Tr. 176):

Q You also previously testified that the defendant told you that he had pointed the gun at Shelia Cradle's head, is that right?

A That was the second time he pointed it.

It is manifest that the prosecutor's question "You also previously testified that the defendant told you that he had pointed the gun at Shelia Cradle's head" was not only a highly leading question, but it was in fact blatantly misleading since it stated something to which the witness had not previously testified. In his previous testimony, officer Spriggs merely said that the accused told him that he pointed the pistol in the general direction of the deceased, which is quite different from stating that he had pointed it at Shelia Cradle's head. There is a vast difference, even assuming that appellant pointed the pistol somewhere, between saying that he pointed it in the general direction of the deceased, and pointing it at the head of the deceased. In fact, the difference is so crucial as to render the mere pointing of a firearm at another person reckless conduct³, whereas merely

³ - The Model Penal Code (Proposed Official Draft 1962) Section 211.2 (p.135) provides:

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

pointing the weapon into a general direction would at most appear to be merely ordinary negligence.

Officer Spriggs' testimony, affirming what the prosecution so conveniently and misleadingly put into his mouth, was extremely prejudicial to the accused, and the question as phrased should not have been allowed to stand, or the Court should have at least instructed the jury to disregard the answer to this misleading question. Although no objection to the question was raised at trial, appellant submits that it was such plain error or defect affecting his substantial rights which may be noticed on appeal⁴.

Moreover, this prejudicial introduction of testimony was not subsequently cured. In fact, the alleged statement made by the accused as to the manner in which he was pointing the gun was subsequently contradicted by Officer Springgs' testimony (Tr. 176):

Q Did he show you the manner in which he was holding the gun; that is to say, when the gun went off? Did he demonstrate that he was holding the gun out like this, (indicating) with an arm outstretched, or whether his arm was crooked, or the particular manner that he was holding the gun when the gun discharged?

A No. he didn't.

What can be more inconsistent than the testimony by the same witness that on the one hand the accused was supposed to have said that he pointed the gun at the head of

⁴ - Rule 52(6) F.R. Cr. P.

the deceased, but on the other hand, that he did not show the officer the manner in which he was holding the gun when it went off?

With the exception of officer Spriggs' testimony concerning pointing of the gun at the deceased's head, the record is devoid of any facts supporting the necessary element of extreme recklessness.

Therefore, the question of recklessness was no longer one which was for the jury to decide, and defendant's motion for acquittal should have been granted during that posture of the trial.

2. The Testimony of Police Officer Spriggs Relating to Inculpatory Statements made to him by the Accused after he had been placed under arrest was highly prejudicial and should not have been admitted at trial.

The totality of the circumstances following the accidental fatal shooting of the deceased were such that the accused could not have waived his rights to remain silent and to have the assistance of a lawyer voluntarily, knowingly and intelligently. In the words of the Supreme Court in Miranda v. State of Arizona, 384 U.S. 436, 475 (1966), the focus is on the words "knowingly and intelligently".

Defendant was placed under arrest by officer Spriggs in defendant's apartment. Some time after the

arrival of officer Spriggs and his fellow officer, they asked defendant what happened, as testified to by officer Spriggs (Tr. 164):

Q Now, Officer Spriggs, would you tell His Honor and the ladies and gentlemen of the jury what the defendant said when you asked him what happened?

A Well, the defendant stated he shot by accident. We placed him under arrest and advised him of his rights. Then he proceeded to tell exactly what had happened.

Thus, it is clear that the defendant made his incriminating statements at a time when he had already been placed under arrest. Although defendant was given the constitutional warnings, the evidence establishes that he was in such traumatic shock at that time that he simply was unable to waive his rights voluntarily, knowingly and intelligently (emphasis added). In this regard, appellant finds support not only in Miranda, supra, but also in Connecticut v. Holton, 247 A.2d 229, and State v. Aiken, 434 P.2d 10. In the Holton case, the majority stated that:

"Due process prohibits the evidentiary use of a criminal defendant's incriminating statements unless it is just established that those statements were 'the product of a rational intellect and free will'".

In State v. Aiken, the Court stated that the accused "must be warned of his rights and it must also appear that the accused has knowingly and intelligently elected to refrain from asserting these rights at that time in answering police questions". The principle enunciated

in these two cases, not inconsistent with Miranda, make it abundantly clear that mental awareness of a defendant is a sine qua non for a knowing and intelligent waiver. It would be contrary to all human experience to infer that appellant was able to knowingly and intelligently waive his rights in view of the undisputed evidence that he was sitting alternately on the floor and falling down on the couch while crying all this time. For example, appellant's wife testified (Tr. 36, 37, 38, 39):

Q Now, what if anything did Gene say after you called the police and before you went downstairs?

A. Oh, he kept crying and saying, "Oh, I shot her," and stuff like that, things like that.

Q Well, what things like that did he say?

A. Oh, he kept saying, "I shot her, I shot her. I hope she's not dead". Things like that.

Q What happened after the ambulance left?

A. Then he started crying and everything, and the police started asking him questions and he just answered them. He said, he just kept saying he shot her.

Q What was his physical position during that time? Was he sitting down during that time or was he standing up or what?

A. One time he just kind of fell down on the couch and then one time he sat down on the floor and ju st sat there.

Q What was he doing when he fell down on the couch?

A. Just crying.

Q What about the time that he sat down on the floor?

A. He was crying.

Q Were his answers to the questions of the policemen always logically responsive or did they vary?

A. They varied.

Q When that same question was repeated, would he give a different answer?

A. Usually all he would say was "I shot her".

Q. Could you explain that? Explain what you mean?

A. Sometimes if they would ask him a question, all he would say is "I shot her." He wouldn't answer the question logically.

It is appellant's position that an analogy can be properly drawn to a defendant's state of mind when he enters a plea of guilty for he must do so knowingly. Analogously, a defendant should not be held to have knowingly and intelligently waived his rights where the evidence shows that he was physically and mentally incapable of doing so, as is shown in this case.

It was, therefore, error to deny defendant's motion to suppress defendant's incriminating statements made to officer Spriggs after the arrest, and to admit officer Spriggs' testimony in this respect.

3. The evidence, when considered in its entirety, was insufficient as a matter of law to let the case go to the jury.

At the close of defendant's evidence, made up of his own testimony, and that of his wife and gun expert Col. Crossman, all the facts were consistent with a finding of accidental shooting caused by simple negligence. Defendant's renewed motion for acquittal should have been granted at this stage of the trial because the Government failed to prove beyond a reasonable doubt that defendant was extremely reckless.

The clear distinction between ordinary negligence on the one hand and extreme recklessness amount to criminal negligence on the other hand is succinctly stated in U.S. v. Pardee, 368 F.2d 368, 374 (CA4 1966), where the Court, citing State of Maryland v. Chapman, 101 F.Supp. 335 (D.Md. 1951) reiterated:

"In my view the law is reasonably clear that a charge of manslaughter by negligence is not made out by proof of ordinary simple negligence that would constitute civil liability. In other words, the amount or degree or character of the negligence to be proven in a criminal case is gross negligence, to be determined on the consideration of all the facts of the particular case, and the existence of such gross negligence must be shown beyond a reasonable doubt. If the resultant deaths were merely accidental or the results of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found."

and, also at page 374:

"'Gross negligence' is to be defined as exacting proof of a wanton or reckless disregard for human life. Furthermore, to convict, the slayer must be shown to have had actual knowledge that his conduct was a threat to the lives of others, or to have knowledge of such

circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others. The reason of the latter comment is that awareness of the tendency to danger, or the foreseeability of injury, from the act or omission is an indispensable element of negligence."

When viewed with this background of the law as it applies to involuntary manslaughter, the record here simply does not support more than simple negligence. True, the defendant, a youthful 23-year old, toyed with a gun, but he had checked it to make sure that it was not loaded. He playfully pointed it at the wall, pulling the trigger, and it merely clicked, just as he expected. Yet, somehow a bullet remained in the pistol which was of poor construction and very defective, and that bullet found its deadly path to the deceased. "Gross negligence" being defined as exacting proof of a wanton or reckless disregard for human life, U. S. v. Pardee, supra, it is clear that on the basis of this record no reasonably prudent juror could have found anything but ordinary simple negligence of a 23-year old young man, and the question of recklessness should, therefore, not have been submitted to the jury. Instead, defendant's motion of acquittal should have been granted at that stage of the trial.

4. The Court erred in failing to instruct the jury that it could also find that the fatal shooting was the result of an accident.

On page 8 of the Court's instructions to the jury, the Court made the following charge:

"Now, the defendant in this case is charged with involuntary manslaughter. Therefore, you have to consider more than whether or not there was an accidental shooting, that is, "accidental" as lay people would consider it."

This charge necessarily implies that the jury had to find something over and beyond the fact of accidental shooting, and when viewed in this context, it was error to delete from the charge that the jury can also find that the fatal shooting was merely the result of an accident.

5. The Court erred in instructing the jury that the Government in any prosecution is not required to prove the guilt of a defendant beyond a reasonable doubt.

On page 4 of the Court's instructions to the jury, the following paragraph is found:

"You are reminded that the government in any prosecution is not required to prove the guilt of a defendant beyond a reasonable doubt."

It is appellant's contention that this charge is wholly erroneous and caused substantial prejudice to appellant in that it allowed the jury to reach a verdict on the ground that it need not have been persuaded of defendant's guilt beyond a reasonable doubt.

If the Court meant to draw a distinction between the Government's burden of proving beyond a reasonable doubt every essential element of the offense on the one

hand, and proving defendant's guilt beyond a reasonable doubt on the other hand, then such distinction, if there is any, was not explained to the jury. Certainly, the average juror would not be able to discern any distinction on his own, not being trained in the law, between the Government's burden involved in proving beyond a reasonable doubt every essential element of the offense charged, and the Court's instruction that the Government need not prove the guilt of a defendant beyond a reasonable doubt. Indeed, if there is such a distinction, it even eludes appellant's counsel.

It is a fundamental principle of our criminal law that the Government must prove its case in a criminal proceeding "beyond a reasonable doubt". Wigmore, Evidence 2497 (3d ed. 1940). It is appellant's position that the expression of this fundamental principle in these words is equivalent to saying that the Government must prove defendant guilty beyond a reasonable doubt.

The court's instruction to the jury contrary to this basic constitutional tenet was highly prejudicial to defendant and should in itself be sufficient cause for reversal of the judgment.

CONCLUSION

For the foregoing reasons, the appellant submits that this Court should reverse the judgment of the trial court and remand the case with instructions that the indictment be dismissed.

Respectfully submitted,
Samuel L. Davidson
Samuel L. Davidson,
360 National Press Building,
Washington, D. C. - 20004
Telephone 638-0603

(Court-appointed attorney for appellant).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for Appellant has been personally served at the Office of the United States Attorney, Appellate Section, U.S. Court House, this 19th day of February, 1970.

Samuel L. Davidson
Samuel L. Davidson.